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Federal Communications Commission  
Office of the Secretary

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	MB Docket No. 04-191
	)	
<b>San Francisco Unified School District</b>	)	
	)	
For Renewal of License for Station KALW(FM),	)	Facility ID No. 58830
San Francisco, California	)	File No. BRED-19970801YA

To: Chief Administrative Law Judge  
Richard L. Sippel

**ENFORCEMENT BUREAU'S OPPOSITION TO**  
**MOTION TO ENLARGE THE ISSUES**

1. On September 7, 2004, the San Francisco Unified School District ("SFUSD") filed a Motion to Enlarge the Issues in the above-captioned proceeding ("SFUSD Motion"). Pursuant to section 1.294(c) of the Commission's rules,<sup>1</sup> the Enforcement Bureau (the "Bureau") files the following Opposition.<sup>2</sup>

2. SFUSD seeks to enlarge the issues in this proceeding by adding an issue to determine whether its Station KALW(FM) "has provided meritorious service during the license term justifying renewal of SFUSD's license."<sup>3</sup> As SFUSD acknowledges, the factual issues designated by the Commission with respect to SFUSD's captioned renewal application for Station KALW(FM) concern false certification and misrepresentation. Depending on how those

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<sup>1</sup> 47 C.F.R. § 1.294(c). See also 47 C.F.R. § 1.229(d).

<sup>2</sup> By Order, FCC 04M-24, released September 10, 2004, the Presiding Officer set September 21, 2004, as the due date for the Bureau's response to the SFUSD Motion.

<sup>3</sup> SFUSD Motion at 2.

issues are resolved, the Commission will determine whether the application should be granted.<sup>4</sup> SFUSD further observes that, regardless of whether its renewal application is granted or denied, the Commission must determine whether forfeitures should be imposed for violations by SFUSD of sections 73.1015, 73.3527 and/or 73.3613 of the Commission's rules.<sup>5</sup> Asserting that the Commission has on many occasions granted similar motions filed by renewal applicants, SFUSD contends that the circumstances of the instant case warrant grant of its Motion.<sup>6</sup>

3. As an initial matter, SFUSD's Motion should be denied as facially deficient. Even assuming that Station KALW(FM) provided "meritorious service," SFUSD failed to make any proffer whatsoever to support this claim. Under the Commission's rules, motions to enlarge "shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof."<sup>7</sup> Rather than providing such allegations of fact and supporting affidavits, SFUSD has provided only general arguments from counsel urging that its requested issue be added. Thus, SFUSD's Motion does not meet the basic requirements for a motion to enlarge. Consequently, it should be denied.

4. Beyond its facial deficiency, however, SFUSD's Motion is without merit. SFUSD acknowledges that this hearing proceeding involves issues of possible misrepresentation. In such

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<sup>4</sup> *Id.* at 3; *San Francisco Unified School District (Hearing Designation Order and Notice of Apparent Liability for Forfeiture)*, 19 FCC Rcd 13326, 13337-38, ¶ 24 (2004) ("HDO").

<sup>5</sup> SFUSD Motion at 5-6; *HDO*, 19 FCC Rcd at 13338, ¶ 25.

<sup>6</sup> *See* SFUSD Motion at 4.

<sup>7</sup> 47 C.F.R. § 1.229(d).

cases, the Commission has made clear that it will limit the mitigating impact of meritorious programming or service to disqualifying issues other than misrepresentation.<sup>8</sup> Because, in the *HDO*, the Commission identifies only deceit – either in the form of a false certification to its renewal application or subsequent false or misleading statements made in connection with that certification – as a basis for the denial of SFUSD’s captioned renewal application,<sup>9</sup> any “meritorious service” is irrelevant to whether that application should be granted and SFUSD’s license for Station KALW(FM) renewed.

5. SFUSD correctly observes that, regardless of whether it establishes that its renewal application should be granted, the Presiding Judge must still determine whether a forfeiture

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<sup>8</sup> *KQED, Inc.*, 3 FCC Rcd 2601, 2607, ¶ 27 (Rev. Bd. 1988), *quoting Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423, 425 n. 3 (“Some forms of misconduct (e.g., misrepresentation...) are *prima facie* so serious that a grant would not be in the public interest, no matter how meritorious the applicant’s past programming record, and in such cases the Commission will not even consider programming evidence as a mitigating factor.”); *rev. denied*, 5 FCC Rcd 1784, 1785, ¶ 6 (1990), *recon. denied*, 6 FCC Rcd 625 (1991), *aff’d sub nom. California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir. 1991). By comparison, the hearing cases cited by SFUSD in its Motion at 4, in which the Commission added an issue concerning, or considered the impact of, meritorious service or programming, involved issues other than misrepresentation as possible bases for disqualification. *WIGO, Inc.*, 85 FCC 2d 196 (1981), (lottery broadcasts); *Voice of Charlotte Broadcasting Company*, 58 FCC 2d 991 (Rev. Bd. 1976) (various technical rules); *Chesapeake-Portsmouth Broadcasting Corp.*, 42 FCC 2d 1030 (Rev. Bd. 1973) (adequacy of licensee control, equal employment opportunity, technical matters, public file). Likewise, in the other hearing cases cited by SFUSD, the Commission specifically limited consideration of the licensee’s meritorious programming to issues other than misrepresentation or those involving moral turpitude. *See WWLE, Inc.*, 57 FCC 2d 407, ¶ 2 (Rev. Bd. 1975); *Norjud Broadcasting, Inc.*, 55 FCC 2d 808, ¶ 2 (Rev. Bd. 1975), *White Mountain Broadcasting, Inc.*, 54 FCC 2d 299, ¶ 2 (Rev. Bd. 1975) (meritorious programming may not be used to mitigate fraudulent billing); *Oil Shale Broadcasting Co.*, 52 FCC 2d 1167, ¶ 4 (Rev. Bd. 1975) (mitigating effect of the evidence adduced pursuant to the meritorious programming issue limited to those issues which do not involve misrepresentation or other acts involving moral turpitude relating directly to the operation of a broadcast station).

<sup>9</sup> *See HDO*, 19 FCC Rcd at 13337-38, ¶ 24.

penalty should be imposed for certain specified rule violations.<sup>10</sup> Acknowledging that the beneficial effect of its claimed “meritorious service” may be limited to violations other than misrepresentation, SFUSD argues that evidence of meritorious service “could mitigate” any such violations.<sup>11</sup>

6. In determining a forfeiture amount, however, the Communications Act of 1934, as amended, does not require consideration of Station KALW(FM)’s service or programming over a more than 13-year span as SFUSD urges.<sup>12</sup> Rather, the forfeiture determination must focus on the circumstances surrounding the violation or violations and on the circumstances attendant to the violator.<sup>13</sup> SFUSD cites no case in which the Commission adjusted a forfeiture penalty

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<sup>10</sup> See Motion at 6; *HDO*, 19 FCC Rcd at 13338, ¶ 25.

<sup>11</sup> See Motion at 6.

<sup>12</sup> See Motion at 6-7. Presumably, SFUSD wishes the Presiding Judge to consider its service from as far back as December 31, 1990, the date of its last renewal of license for Station KALW(FM) (official notice requested), up to July 16, 2004, the date the *HDO* was released. In this regard, the Bureau notes that a challenged renewal applicant must generally run on its record, which is deemed to have ended either at the expiration of its license term, in this case December 1, 1997, or when the licensee became aware of the renewal challenge, which would have been sometime in November 1997. See generally *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966). Consequently, there would little or no benefit that could accrue from burdening the record in this proceeding with evidence of service provided by SFUSD once it became aware of the petition to deny filed by Golden Gate Public Radio.

<sup>13</sup> See 47 U.S.C. § 503(b)(3)(D) (“In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”). See also 47 C.F.R. § 1.80(b)(4) and its accompanying note.

because of proof of a licensee's meritorious service or programming.<sup>14</sup>

7. Accordingly, the Presiding Officer should deny SFUSD's Motion to Enlarge the Issues.

Respectfully submitted,



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<sup>14</sup> *Arkansas Educational Television Commission*, 6 FCC Rcd 478, 480-81, ¶¶ 11-13 (1991), the case cited by SFUSD in its Motion at page 6 in support of its contention that proof of meritorious service could inform the Commission's discretion regarding an appropriate sanction, did not involve the imposition of a forfeiture penalty. In that case, the Commission reviewed the licensee's programming documentation in connection with allegations that the licensee had apparently failed to conduct community ascertainment as the rules had then required before determining that a hearing was unnecessary.

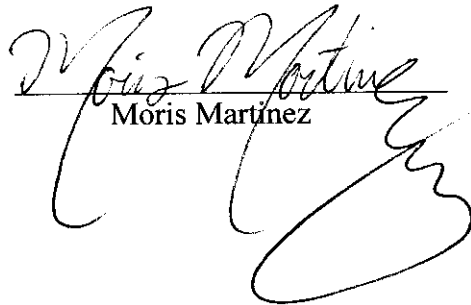
CERTIFICATE OF SERVICE

Moris Martinez, a clerk in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has, on this 21st day of September, 2004, sent by first class United States mail, by electronic mail ("email"), and/or by hand, copies of the foregoing "Enforcement Bureau's Opposition to Motion to Enlarge the Issues" to:

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